Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19

Justice

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FELIX GARCIA,

Plaintiff,

Index No.: 28679/08
Motion Date: 2/23/11
Motion Cal. No: 12
Motion Seq. No: 1

-against-

DIANA MARTINEZ and JOCELYN MARTINEZ,

Defendants.

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The following papers numbered 1 to 12 read on this motion by defendants for an order granting defendants Diana Martinez and Jocelyn Martinez summary judgment pursuant to CPLR 3212, dismissing the complaint and any and all cross claims against them on the basis that plaintiff did not sustain a "serious injury" under Insurance Law 5102(d).

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition	5 - 9
Reply Affirmation	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendants move for an order granting summary judgment pursuant to CPLR 3212, dismissing the complaint and any and all cross-claims against him on the grounds that plaintiff did not sustain a "serious injury" under Insurance Law 5102(d). This is an action for personal injury in which plaintiff Felix Garcia ("plaintiff") alleges that he sustained serious personal injury on August 17, 2007, as a result of a motor vehicle accident. Plaintiff claims that as a result of the accident he sustained serious injury based, inter alia, decrease in her range of motion in the neck and back; right knee tear; right shoulder effusion and tendinosis. Defendants move for summary judgment in their

favor on the ground that plaintiff did not sustain a "serious injury" within the meaning of the Insurance Law. That statutory provision provides, in pertinent part, that a"serious injury"is defined as:

> a personal injury which results in ...significant disfigurement; ...permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured party from performing substantially all of the material acts which constitute such person's customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

The issue of whether plaintiff sustained a serious injury is a matter of law to be determined in the first instance by the court. (*See Licari v. Elliott,* 57 N.Y.2d 230 [1982].) The burden is on the defendant to make a prima facie showing that plaintiff's injuries are not serious. (*Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 [2002].) A defendant can meet his or her prima facie burden by submitting the affidavits or affirmations of medical experts, who, through objective medical testing, conclude that plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d). (*See Margarin v. Krop*, 24 A.D.3d 733 [2nd Dept. 2005]; *Karabchievsky v. Crowder*, 24 AD3d 614 [2nd Dept. 2005].) The threshold question in determining a summary judgment motion on the issue of serious injury is the sufficiency of the moving papers, with consideration only given to opposing papers once the defendant, as the movant, makes a prima facie showing that the plaintiff did not

sustain a serious injury. (*See, Toure v Avis Rent A Car Sys.*, 98 N.Y.2d 345 (2002).

Defendants met their initial burden of establishing that plaintiff did not sustain a serious injury through the submission of the affirmation of Dr. Alan J. Zimmerman, a Fellow of the Academy of Orthopaedic Surgeons, wherein Dr. Zimmerman compared the results elicited from the goniometer testing to the normal range of motion testing and found that the range of motion tests for plaintiff's cervical and lumbar spine, shoulders and knees were all within normal limits and that plaintiff was not disabled. (*Staff v. Yshua*, 59 A.D.3d 614 [2nd Dept 2009].) In addition, Dr. Zimmerman concluded that plaintiff's bulging discs were degenerative and pre-existing. Dr. Sheldon Feit, a radiologist, affirmed that the lumbar findings of disc bulge were indicative of pre-existing degenerative changes and not causally related to the subject accident. Dr. Feit, upon review of the MRI, found meniscal degeneration in the right knee and that there was no findings causally related to the subject accident. As to a non permanent injury lasting for a duration of at least 90 days, defendants note that plaintiff, by his own admission in his deposition returned to work two months after the accident and performed all of the duties as a porter/doorman with the exception of helping with heavy bags.

Through the submission of the affirmed medical report of defendants' experts and the deposition of plaintiff, defendants established that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). (*See, Pommells v. Perez*, 4 N.Y.3d 566 [2005].) Defendant's evidence being sufficient to make a prima facie showing that plaintiff did not sustain a serious injury [*Pommells v. Perez*, supra.], thereby establishing his entitlement to summary judgment dismissing the complaint insofar as asserted by plaintiff on the threshold issue [see, *Baez v. Rahamatali*, 6 N.Y.3d 868 (2006), the burden then shifts to plaintiff to demonstrate the existence of a triable issue of fact as to whether he sustained a serious injury. (*See, Browne v M&P Distrib. Corp.*, 52 A.D.3d 638 [2nd Dept 2008].) Plaintiff did not meet his burden.

In opposition, plaintiff submitted his attorney's affirmation; the chiropractic report of Gerson Mendoza, D.C., an affidavit of Dr. Mendoza, the report of Robert Diamond, MD, radiologist; and the report of Dr. Dov Berkowitz, MD, an orthopaedist. With respect to plaintiff's attorney's affirmation, it is well recognized that an attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance. *(Zuckerman v. City of New York,* 49 N.Y.2d 557, 563 (1980); *Warrington v. Ryder Truck Rental, Inc*., 35 A.D.3d 455 [2nd Dept. 2006], and is insufficient to show that plaintiff sustained a serious injury, particularly where, as here, there was no objective medical evidence to demonstrate that he sustained a serious injury. *(See, Codrington v. Ahmad*, 40 A.D.3d 799 [2nd Dept. 2007].)

Many of the documents submitted by the plaintiff were inadmissible as they were either unsworn or unaffirmed (e.g., the radiology report from St. Vincent's, the letters from Noel Fleischer, MD, a Board certified neurologist and the copies of purported letters on Dr. Mendoza's letterhead to State Farm Insurance with invoices for chiropractic care). (*see Grasso - v- Angrami,* 79 NY2d 813 [1991]; *Varveris v. Franco*, 71 A.D.3d 1128 [2nd Dept 2010].)

Plaintiff testified in his deposition that he was involved in a prior motor vehicle accident on October 27, 2006, wherein he sustained injuries to his neck and leg. The report of Dr. Berkowitz indicates that plaintiff also sustained a back injury as a result of the 2006 accident. Defendants assert in reply that the reports of Drs. Mendoza and Diamond were speculative as they failed to properly address plaintiff's prior accident. (*Joseph v. A and H Livery*, 58 A.D.3d 688 [2nd Dept 2009].) It is well settled that where there is evidence of a pre-existing injury and the plaintiff's doctor fails to address these injuries, "an issue of fact cannot be created by the plaintiff's doctor's simply repeating the mantra that the injuries were caused by the [instant] accident." (*Linton v. Nawaz*, 62 A.D.3d 434, [1st Dept 2009] citing *Pommells v. Perez*, 4 N.Y.3d 566,[2005].) Accordingly, as Dr. Mendoza and Dr. Diamond failed to address plaintiff's prior

accident, their range of motion findings are inadmissable as it relates to the cervical and lumbar spines.

Moreover, the medical reports submitted on behalf of plaintiff "failed to raise a triable issue of fact as to whether the plaintiff sustained a serious injury to his right knee (and shoulder) under the permanent loss, the permanent consequential limitation of use, or the significant limitation of use categories of Insurance Law § 5102(d), because the report failed to provide medical evidence that was contemporaneous with the subject accident which showed initial range-of-motion limitations in the plaintiff's right knee (and shoulder) that were significant in nature." (*Rush v. Kwan Chiu*, 79 A.D.3d 1004, [2nd Dept 2010].)

Furthermore, plaintiff failed to raise a triable issue of fact as to whether he sustained a serious injury to his knee and shoulder "under the permanent loss of use, the permanent consequential limitation of use, and/or the significant limitation of use categories of Insurance Law § 5102(d), since he failed to set forth any objective medical findings from a recent examination concerning" his knee and shoulder. (*Jean v. Labin-Natochenny*, 77 A.D.3d 62 [2nd Dept 2010].)

Finally, plaintiff failed to provide any competent medical evidence that the injuries he allegedly sustained in the subject accident rendered him unable to perform substantially all of his usual and customary daily activities for not less than 90 days of the first 180 days subsequent to the subject accident. (*Robinson-Lewis v. Grisafi*, 74 A.D.3d 774 [2nd Dept 2010].) Plaintiff, as noted above, testified at his deposition that he returned to work in October, only two months after the accident.

In addition, neither the plaintiff nor his doctors adequately explained the gap in the plaintiff's treatment from the time he discontinued treatment, in May of 2008, and the date of the within motion. (*Ayala v. Katsionis*, 67 A.D.3d 836 [2nd Dept 2009]; citing *Pommells v. Perez*, 4

N.Y.3d 566 [2005].)

Accordingly, based upon the foregoing, defendants' motion for summary judgment on the ground that plaintiff failed to sustain a "serious injury" is granted and the complaint hereby is dismissed.

Dated: April 28, 2011

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Bernice D. Siegal, J.S.C.